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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1125

SAMUEL EMANUEL, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR AND RESIDUARY LEGATEE OF THE SUCCESSION OF IRMA TURNER WILSON AND MARY STEWART EMANUEL,

Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

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Appellants,

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HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment of the District Court for Ouachita Parish, Louisiana decreeing the will of Irma Turner Wilson dated July 7, 1960 to be null and void and assessing cost to be paid by

defendants (Appendix, "A," infra p. 20) is not reported. The opinion of the Court of Appeal, Second Circuit (Appendix, "B," infra pp. 22-30) is reported at 213 So.2d 776. The opinion of the Supreme Court of Louisiana on appellants' petition for Writ of Review (Appendix, "C," infra p. 31) is not reported.

JURISDICTION

On January 10, 1968 the Fourth District Court for Ouachita Parish, Louisiana rendered judgment declaring the will of Irma Turner Wilson dated July 7, 1960 to be null and void and recalled the order of probate of said will (Tr. 156). On February 7, 1968 pursuant to a motion for new trial this judgment was amended so as to order that defendants pay all cost of the proceedings (Tr. 157). The will in question was a statutory will pursuant to R.S. 9:2442. The trial court permitted appellants herein to amend their answer (Tr. 107), and the supplemental and amending answer was filed pursuant to leave (Tr. 115). On the trial of the case the court denied appellants' attempt to introduce evidence in support of their amended answer (Tr. 308-315). The Court of Appeal, Second Circuit, affirmed the ruling of the trial court on the 1st day of June, 1968 and refused an application for rehearing on the 25th day of September, 1968. The Supreme Court of Louisiana denied appellants' petition for Writ of Review on December 10, 1968. A notice of appeal to this court was filed in the trial court on February 13th, 1968 and the Supreme Court of Louisiana on February 13th, 1968. We claim jurisdiction is conferred upon this court under Title 28, United States Code, Section 1257 (2 & 3); Federal Code Annotated, Title 28, Section 1257 (2 & 3).

QUESTIONS PRESENTED

These proceedings involve the Succession of Irma Turner Wilson who died on July 21, 1966 leaving a will wherein she named appellant, Samuel Emanuel, her Testamentary Executor. Samuel Emanuel, Mary Stewart Emanuel and Judge G. Claiborne were also legatees under the will (Tr. 8). On September 14, 1966 Joe Wilson, the surviving spouse of decedent, filed a petition (Tr. 7) in these proceedings requesting notice of any application for appointment as administrator or other legal representative in this succession pursuant to Code of Civil Procedure Article 3091. On October 27, 1966 Samuel Emanuel filed a petition (Tr. 10) in these proceedings praying for the probate of the will of Irma Turner Wilson and same was probated on said date as indicated by the proces verbal (Tr. 14) in these proceedings. On March 15, 1966 Joe Wilson, the surviving spouse of decedent, filed a petition (Tr. 16) herein seeking to declare the will null and void claiming that he would inherit the property under Civil Code Article 924 since decedent left no ascendant, descendant, collateral relations or natural children by her acknowledged. On January 20, 1967 Samuel Emanuel and Mary Stewart Emanuel filed an exception of no cause and no right of action (Tr. 30). A motion for summary judgment (Tr. 36) was filed on April 4, 1967. On May 7, 1967 an answer was filed to the petition of Joe Wilson (Tr. 46). On September 20, 1967 Samuel Emanuel filed a petition to be qualified as executor (Tr. 59) of this succession and served notice (Tr. 63) upon Joe Wilson as requested in his application for said notice (Tr. 7). Joe Wilson died on September 20, 1967 and on September 26, 1967 Harold Chapple, Appellee herein, obtained an order of court (Tr. 64, 65 and 66) substituting himself as party plain-

tiff in these proceedings in lieu of Joe Wilson, having probated the will of Joe Wilson and qualified as the Testamentary Executor in the Succession of Joe Wilson. On September 26, 1967 Samuel Emanuel filed a supplemental and amending petition to be appointed executor in these proceedings (Tr. 67). The supplemental and amending petition expresses the urgency for said qualification. The deed conveying an interest in the succession property is contained in this record (Tr. 70, 71). On September 27, 1967 Harold Chapple filed an opposition to the application of appellant to be appointed executor (Tr. 73). Harold Chapple appeared in the opposition individually and as Testamentary Executor of the Succession of Joe Wilson. He relied upon his appointment and qualification that he obtained without giving notice of intention to so qualify as hereinabove stated. The opposition was taken up on September 28, 1967, the note of evidence on the trial of same being found at Tr. 161. Samuel Emanuel proved by the evidence produced that he was qualified to serve as executor in this succession. The trial court took this matter under advisement and refused to appoint him forthwith notwithstanding the urgency of the application as shown by the minutes of the court (Tr. 2). Samuel Emanuel made application for certiorari to the Court of Appeal, Second Circuit, from the court's refusal to appoint Samuel Emanuel forthwith and the Second Circuit Court of Appeal ruled that the remedy for the ruling of the court appointing an administrator was by appeal (Appendix "D," p. 32).

In the meantime on September 26, 1967 two (2) days before the hearing on this rule Harold Chapple requested the case to be fixed for trial on its merits. The notice of the request was mailed to counsel for Samuel Emanuel, which copy was received on September 28, 1967. The court fixed this

matter for trial on October 5, 1967 at which time there was still pending the application of Samuel Emanuel to be qualified as Testamentary Executor of this succession and the ruling of the Court of Appeal, Second Circuit, on the application for certiorari returnable to same on or before Friday, October 7, 1967 (Tr. 80). Samuel Emanuel filed a motion (Tr. 81) to have the fixing of the trial of the case set aside pursuant to Rule Sixteen of the trial court. The court refused to sign the order upsetting same (Tr. 83). On October 4, 1967 Samuel Emanuel filed a motion for continuance (Tr. 89) and a petition for stay (Tr. 91), both of which were refused by the trial court, as per minutes of the court on October 4, 1967 (Tr. 3). In the meanwhile on October 5, 1967, the day this matter was assigned for trial there was still before the court a motion for security for cost and a motion to set aside the order substituting Harold Chapple as party plaintiff in this matter (Tr. 86). These motions being called to the attention of the court were promptly overruled as shown by the minutes of the court on October 5, 1967 (Tr. 3). Samuel Emanuel, fighting to stay alive in this case, had issued subpoenas for out of Parish witnesses at considerable expense some of whom were served and others were not served for lack of sufficient time.

Appellants finally filed a motion to recuse (Tr. 95) which was supplemented as shown at Tr. 101. The motion complained that mover was being denied a fair trial and that it would be fair and just to assign one to these conflicting cases, Succession of Joe Wilson or the Succession of Irma Turner Wilson to another Judge. The motion was overruled by the court on October 11, 1967 (Tr. 3). On November 7, 1967 (Tr. 102) Samuel Emanuel filed an exception of no cause and no right of action making a part of said exception a certified copy of the suit to annul the will of Joe Wilson and

also a certified copy of the supplemental and amending petition to annul the will of Joe Wilson. Prior to this date and on October 13, 1967 Samuel Emanuel was confirmed Testamentary Executor of this succession as per judgment of the court (Tr. 154) and as per reason of the court at Tr. 150.

In preparation for the trial of this case on November 15, 1967 Samuel Emanuel filed a motion (Tr. 107) for leave to amend his answer to set up affirmative defenses, which leave was granted by the court (Tr. 4) and on November 17, 1967 (Tr. 115) the supplemental and amending answer was filed. On November 15, 1967 Samuel Emanuel filed a supplemental and amending exception of no cause and no right of action (Tr. 108) amending his exception filed on November 7, 1967. The basis of this exception was that Harold Chapple had no right or interest to prosecute this succession for reason that the will of Joe Wilson was an absolute nullity and therefore could not transmit any rights to him as legatee, a certified copy of the will being made a part of this exception. This exception of no cause and no right of action has never been passed on by the trial courts or the appellate courts of Louisiana. Samuel Emanuel sought to take the deposition of the attorney of record for Harold Chapple and also the witnesses to the will of Joe Wilson on November 16, 1967 (Tr. 4). The court ruled that testimony relative to the Succession of Joe Wilson be excluded.

The questions are:

1. Whether or not a Testamentary Executor must defend at his cost an attack upon the estate he is bound by reason of his office to protect, and also whether or not a judgment casting him for cost denies him equal protection of the

law and deprives him of his property without due process of law.

2. Whether or not Code of Civil Procedure Article 681 would bar appellants from testing the validity of the will of Joe Wilson, which will of Joe Wilson attempts to dispose of property that appellants would inherit under the will of Irma Turner Wilson in the absence of any will of Joe Wilson and if so whether or not said Article 681 is unconstitutional for reason of denying appellants equal protection of law and depriving them of their property without due process of law.

3. Whether or not Samuel Emanuel was denied equal protection of the law when the court refused to qualify him forthwith as executor of this succession upon the trial of opposition, the court having refused to do so and having assessed the cost in his efforts to be so qualified against him individually and whether or not this deprives him of his property without due process of law.

4. Whether or not the validity of the will of Joe Wilson was put at issue by the filing in these proceedings of the order of probate of the will of Joe Wilson.

5. Whether or not the will of Irma Turner Wilson in these proceedings is invalid for lack of form even though no fraud, deception, undue influence or mental incapacity on the part of the testator was alleged or proven on the trial of this cause.

6. Whether or not the real and actual interest set out in Article 681 of the Louisiana Code of Civil Procedure means only one who would inherit directly from a succession and if

so does it in this case deny appellants equal protection of the law and deprive them of their property without due process of law.

7. Would Article 924 of the Louisiana Civil Code require Joe Wilson to prove that Irma Turner Wilson left no descendent, ascendent, collateral relations or natural children by her duly acknowledged and if so whether or not his failure to so prove in this case denies appellants herein equal protection of the law and/or deprives them of their property without due process of law.

8. The eighth issue in this case (by error referred to as nine in the notice of appeal) is whether or not Joe Wilson, the surviving spouse of decedent, had a right to change this testamentary succession to an irregular succession by making an attack on the will in this succession for lack of form only and without any allegations or proof of fraud, deception, undue influence or mental incapacity on the part of the testator.

STATEMENT

Decedent left a statutory will dated July 7, 1960, by which will she disposed of property belonging to her separate estate. This will was made pursuant to R. S. 9:2442. Joe Wilson, the surviving spouse in community of decedent attacked this will as being null and void, his position being he would inherit her estate under Civil Code Article 924 since she left no relations whatsoever. Joe Wilson died on the 20th day of September, 1967 before any hearing was had on the validity of the will of his wife. He left no relations whatsoever

and therefore his action attacking this will would have abated, but for a last will and testament that he left naming Harold Chapple, appellee herein, his Testamentary Executor and universal legatee. Samuel Emanuel the Testamentary Executor in these proceedings claims that the will of Joe Wilson is an absolute nullity and confers no right upon Harold Chapple to proceed. The trial court ruled that Samuel Emanuel could not test the will of Joe Wilson since he would not inherit from the Succession of Joe Wilson. Samuel Emanuel claims that the office of Harold Chapple as Testamentary Executor of the Succession of Joe Wilson is null and void. He further set up affirmative defenses charging fraud, duress, undue influence and conspiracy in obtaining the will of Joe Wilson. He charges ill practices on the part of the Testamentary Executor and pleads estoppel as a defense. The trial court denied Samuel Emanuel the right to introduce any evidence in support of his affirmative defenses (Tr. 308 - 315). Samuel Emanuel was refused by the trial court in an attempt to take deposition of the witness to the will of Joe Wilson in support of his affirmative defenses. These witnesses were subpoenaed and were present in court on the date of the trial but counsel for Samuel Emanuel was forced to refrain from calling them in support of his case as shown by the evidence (Tr. 314-315). Appellant, Samuel Emanuel, has been assessed with cost of these proceedings individually wherein he sought to perform the duties of his office. An exception of no cause and no right of action was filed in the Court of Appeal, the basis of which was that the only testimony in the record to the effect that decedent left no relations was the testimony of Harold Chapple that decedent said she had no relatives, which testimony was promptly objected to (Tr. 324, 325).

THE QUESTIONS ARE SUBSTANTIAL

1. Civil Code Article 1682 (Appendix, "E" infra, p. 23) provides for cost in succession proceedings and it is clear in this case that all cost in connection with this litigation should be assessed against the estate as provided by said Article and the following cases: *Succession of Pizzati*, 75 So. 498, *Succession of McCan*, 21 So. 768, *John Close v. Charles Close*, 13 La. Ann. 590, *Sterlin's Executor v. Gros*, 5 La. 100, *Succession of Heffner*, 21 So. 905, and *Succession of Filhiol*, 49 So. 138. These cases represent the Louisiana Review for many years past.

2. The argument on this issue as to whether or not the Testamentary Executor and the residuary legatee have such an interest in the will of Joe Wilson as would permit them to test the validity of said will would be the same as that presented in the Succession of Joe Wilson on appeal in this court. The trial court ruled that appellants herein could not attack the will of Joe Wilson collaterally and therefore could not take the deposition of the witnesses to the will of Joe Wilson in support of their affirmative defenses. This is because the court reasoned that appellants would not inherit from the Succession of Joe Wilson. This necessarily brings into question Code of Civil Procedure Article 681 (Appendix "F," infra p. 34). Our position on this point is that we have an interest in the will of Joe Wilson to the extent that his will disposed of property which he intended to inherit from this succession and the property in this succession was bequeathed to appellants herein. If the will of Joe Wilson is null and void, then it cannot dispose of the property which had been bequeathed to appellants under the will in this succession. Our further position is that Samuel Emanuel, the executor in this succes-

sion, was performing the duty required of him in attempting to test the will of Joe Wilson, which was in defense of the succession he represents, Code of Civil Procedure Article 685 (Appendix "G" infra, p. 35), *Gurley v. City of New Orleans*, 1909, 124 La. 390, 50 So. 411. It is clear in Louisiana that the cost incurred by an executor should be paid out of the estate, Civil Code Article 1682.

3. Samuel Emanuel gave Joe Wilson notice of his application to qualify as Testamentary Executor in this case (Tr. 63) but Harold Chapple failed to give the notice required of him in the Succession of Joe Wilson. Our position is that Samuel Emanuel should have been confirmed executor under the will in this case immediately upon the trial of the opposition and that there was no good reason to not confirm him as such. The proper Articles of the Louisiana law governing this point are Articles 3082 of the Louisiana Code of Civil Procedure and also Article 3097.

Article 3082.

Unless the person named in the testament as executor is disqualified on any of the grounds assigned in Article 3097, the court shall render an order upon his petition for confirmation, confirming him as testamentary executor and directing the issuance of letters testamentary to him after he has taken his oath of office and furnished security, if required.

Article 3097.

No person may be confirmed as testamentary executor, or appointed dative testamentary executor, provisional administrator, or administrator who is:

(1) Under twenty-one years of age;

(2) Interdicted, or who, on contradictory hearing, is proven to be mentally incompetent;

(4) A nonresident of the state who has not appointed a resident agent for the service of process in all actions and proceedings with respect to the succession, and caused such appointment to be filed in the succession proceedings.

(5) A corporation not authorized to perform the duties of the office in this state; or

(6) A person who, on contradictory hearing, is proved to be unfit for appointment because of bad moral character.

The evidence taken on the trial of the opposition (Tr. 161) clearly shows that Samuel Emanuel was not disqualified for any reason stated in Article 3097. If he had been so disqualified there would have been no occasion for him to appear in this suit individually. The court having refused to appoint Samuel Emanuel as such Testamentary Executor and only appointed him such after application for writs of certiorari was filed with the Court of Appeal, Second Circuit, State of Louisiana, resulted in an expensive burden placed upon defendant which he has now been ordered to discharge individually. It is our contention here that the ruling of the Louisiana Courts in this respect denies defendant equal protection of the law and deprives him of his property without due process of the law contrary to the constitution and laws of the United States.

4. Harold Chapple filed in the record a certified copy of

the order of probate of the will of Joe Wilson (Tr. 137 - p-2). He states at page 310 of the record and note of evidence that his purpose for filing same was to show the qualifications of Harold Chapple as Testamentary Executor and to back up his qualifications and to show that he was qualified. We asked leave of court (Tr. 309) to attack this certified copy of the order of probate of said will and to bring in witnesses to the will of Joe Wilson in support of our affirmative defenses. This was denied. Our position is that the validity of the will of Joe Wilson is at issue in these proceedings and that appellants were denied equal protection of the law and deprived of their property without due process of law.

5. There was no fraud of any kind alleged in the petition attacking the will in this case. There was also no attempt to prove any such fraud on the trial of the case. The will in question was prepared in the office of Billye L. Adams, an attorney, and all of the witnesses on the trial of this case testified (Tr. 235) to the effect that the testator was present at all times and apparently thought that her will had been properly drawn. The Second Circuit Court of Appeal in this case would seem to be holding that the statute must be strictly followed without regards to the presence or absence of the purpose it seeks to prevent. The Third Circuit in *Mary Howard v. John Gurther*, 215 So.2d 222, would seem to follow the same view. The First Circuit in *Succession of Lydia Martin Babin*, 215 So.2d 649, would seem to hold otherwise for in this case the court said:

> "Failure of attestation clause of will to recite that will was signed on both pages would not be defect as to substance which would invalidate will. LSA-R.S. 9:2442, 9:2442 (3)."

"When mischief against which statute relating to wills was enacted is not present, courts favor finding substantial compliance with statute. LSA-R.S. 9:2442, 9:-2442 (3)."

The Supreme Court of Louisiana in *Succession of Nourse,* 204 La. 691, 101 So.2d 204, and *Succession of Eck*, 223 La. 764, 98 So.2d 181, 183, followed the views of substantial compliance. To the same effect is *Succession of Pickett*, 180 So. 2d 670.

Thus, the Louisiana Courts are in conflict and the Supreme Court in this case evidenced its approval of the result reached by the Court of Appeal by refusing the petition for Writ of Review, *State ex rel. Henry v. 8-Mile Post Plumbing Supplies, Inc. et al,* 63 So.2d 749. Everything the statute seeks to prevent appellants say in their amending answer (Tr. 115) setting up their affirmative defenses is present in the making of the will of Joe Wilson. It is the will of Joe Wilson that appellee claims gives him the right to attack the will in this case.

6. The ruling of the court to the effect that appellants herein did not allege that they would inherit from the Succession of Joe Wilson show that they have no interest to test his will and therefore no right to introduce evidence in support of their affirmative defenses and also to attack the order of probate of the will of Joe Wilson in these proceedings is to overlook the plain language of Article 681 of the Code of Civil Procedure. In the Succession of Joe Wilson before this court appellants herein amended their petition in the trial court without leave of court, and sought further to amend the petition with leave of court but were refused. The amended petition reads as follows:

Petitioners wish to amend said original petition by adding paragraph seven to say as follows:

7. That a copy of the purported last will and testament of Joe Wilson is attached to and made a part of this petition for the purpose of this suit. That in said will decedent, Joe Wilson proposes to dispose of property belonging to the succession of Irma Turner Wilson contrary to the interest of petitioners as they have been made legatees under the last will and testament of the said Irma Turner Wilson and bequeathed the property attempted to be disposed of in the purported will of Joe Wilson.

It is plain that appellants herein have the real and actual interest as stated in Article 681.

7. This being the separate property of Irma Turner Wilson, Joe Wilson must prove that he comes within the provisions of Article 924 of the Civil Code as he would not inherit this property except where there was no will and decedent left no ascendants, descendants, collateral relations or children by her duly acknowledged. The only evidence in this record that decedent left no collateral relations was the statement by Harold Chapple himself that decedent said she had no relatives. This was the basis of our exception of no cause and no right of action filed in the Court of Appeal. Appellee having been permitted to prevail on this type of evidence denies appellants equal protection of the law and deprives them of their property without due process of law.

8. Under Article 924 of the Louisiana Civil Code the husband will inherit the wife's estate when she dies leaving no descendants, ascendants or collateral relations. Under this Article the annotation makes it clear that Article 924 per-

tains only to the separate property because under Article 915 the surviving spouse inherits the community property as a regular heir and immediately after the descendants. It is further made clear that nothing prevents either spouse, that is husband or wife, from giving by donation inter vivos or mortis causa any or all of his disposable portion. In *Succession of Thompson*, 71 So.2d 544, it is made clear that Article 924 is to be looked at in the light of Articles 917, 918, 921 and 923. There are three kinds of successions as provided in Civil Code Article 878 and described as: (1) Testamentary Succession, (2) Legal Succession and (3) Irregular Succession. Accordingly, there are three kinds of heirs, which correspond with the three kinds of successions just mentioned which are Testamentary or Instituted Heirs, Legal Heirs or Heirs of the Blood and Irregular Heirs. The irregular succession is one which is established in favor of certain persons, or of the state in default of heirs either legal or instituted by testament. The courts of Louisiana held in the case of *Wood v. January*, 1860, 15 La. Ann 516, that there can be no irregular succession where child disposed of estate by will. In this case the estate of decedent was disposed of by a last will and testament making this a testamentary succession. Article 924 of the Civil Code contemplates an irregular succession where decedents died leaving no descendants, ascendants or collateral relations. In view of this fact it would seem to be reasonable that Article 924 just cited makes no provisions for the changing of a testamentary succession to an irregular succession. The court would seem to have reasoned this way in the *Succession of Thompson* cited above when the court held that the right of a natural mother is to be preferred to the right of the surviving husband.

It is clear that the Louisiana cases have consistently held

that amendment to petitions should be allowed whenever possible to prevent dismissal of suit. The Louisiana courts have consistently allowed amendments to petitions that failed to state a right or cause of action. *Reeves v. Globe Indemnity Company of New York*, 185 La. 42, 168 So. 488, *Douglas v. Haro et al*, 39 So.2d 744, *Robinson v. Allen*, 88 So.2d 64, *Bourgeois v. Le Blanc*, 72 So.2d 777, *Federal Insurance Company v. T. L. James & Company*, 69 So.2d 636, *Serio v. Chadwick*, 66 So.2d 9, *Bourg v. J. Ray McDermott & Company*, 52 So.2d 717, *Doyle v. Thompson*, 50 So.2d 505. In *Lemoine v. Lacour*, 34 So.2d 392, it was held that plaintiff, whose petition was insufficient, could amend it so as to state cause of action, if possible, and thereby prevent dismissal of suit. In the Succession of Joe Wilson before this court the trial court refused appellants' motion for leave to amend. In this succession the trial court granted their motion for leave to amend their answer to set up affirmative defenses but denied them the right to introduce evidence in support of the amended answer, thus, there was no real amendment at all. It is equally clear under the cases and also Civil Code Article 1682 that the Louisiana view of the matter of cost is that it should be paid by the estate. However, in this case appellants' motion for leave to amend has been denied and all cost has been assessed against Samuel Emanuel individually. This ruling would seem to be arbitrary such as to deny appellants due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States, giving this court jurisdiction. *New York and Queens Gas Co. v. McCall*, 38 S.Ct. 122, 245 U. S. 345.

We believe that Code of Civil Procedure Articles 681 and 3091 could not have been intended by the Legislature to mean

as construed by the Court of Appeal in *Succession of Joe Wilson*, 210 So.2d 602. These issues were presented to the Louisiana Supreme Court in our petition for Writ of Review, see page three (3) of petition for Writ of Review. In *Atlantic Coast Line R. Co. v. Phillips*, 67 S.Ct. 1584, 332 U. S. 168, this court said: "The United States Supreme Court should reject construction which the Georgia Supreme Court placed upon what Georgia Legislature of 1833 wrote only if United States Supreme Court could be confident that the Georgia Legislature of 1833, by the words it used could not have expressed the meaning thus attributed to it." On the matter of the construction of the statutory will under R.S. 9:2442 (3) the decisions of the Louisiana courts are in conflict as shown above.

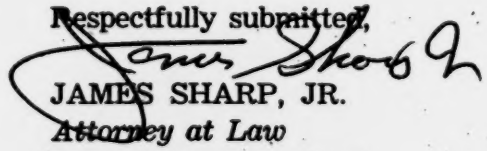
In this case on all points the Supreme Court of Louisiana simply denied the petition for Writ of Review.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

Further submit in the alternative that the papers herein submitted be treated as a petition for wirt of certiorari as provided in 28 U.S.C. § 2103.

Respectfully submitted,



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PROOF OF SERVICE

I, James Sharp, Jr., Attorney for Samuel Emanuel and Mary Stewart Emanuel, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 5th day of March, 1969, I served a copy of the foregoing jurisdictional statement, and its appendices, on Harold Chapple, appellee in connection with this appeal, by mailing same to his counsel of record, Howell H. Heard, in the United States Mail, First Class, postage paid, at his office at 415 Cypress Street, West Monroe, Louisiana.

James Sharp Jr.

JAMES SHARP, JR.

APPENDIX A

STATE OF LOUISIANA, PARISH OF OUACHITA,
FOURTH DISTRICT COURT

SUCCESSION	( )	FILED:
of	( )	FEBRUARY 8, 1968
IRMA TURNER WILSON	( )	ELLA FAYE WHEELER
PROBATE DOCKET	( )	Deputy Clerk,
NUMBER 76,119	( )	Fourth District Court

JUDGMENT

This cause having been regularly filed and served, set down for trial on answers by defendants, taken up and heard on trial, and judgment having been rendered January 10, 1968, and judgment read and signed January 10, 1968, and motion for new trial having been filed by plaintiff, Harold Chapple, and by defendants, Samuel Emanuel and Mary Stewart Emanuel, and new trial having been granted only for the purpose of correcting said judgment signed January 10, 1968, by making provision for payment of Court costs, and having been set down for hearing on new trial, and taken up and heard on new trial, and the law and the evidence being in favor thereof;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harold Chapple, as Testamentary Executor of the Succession of Joe Wilson, and against defendants, Mary Stewart Emanuel, Judge G. Claiborne, and Samuel Emanuel, individually and as Testamentary Executor of the Succession of Irma Turner

Wilson, decreeing and declaring the purported will of Irma Turner Stewart (later named "Irma Turner Wilson") dated July 7, 1960, and probated in these proceedings by order of probate of this Court dated October 27, 1966, to be null and void, and rescinding and recalling said order of probate of said purported will dated October 27, 1966, in these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fee of Gilbert T. Brown, Jr., as Curator Ad Hoc for Judge G. Claiborne be and the same is fixed at the amount of Two Hundred Fifty and no/100 ($250.00) dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants pay all costs.

Judgment on rehearing rendered in Open Court February 7, 1968.

Judgment on rehearing read and signed in Open Court February 8, 1968.

JESSE HEARD
Judge, Fourth District Court

APPENDIX B

NO. 11048
COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

SUCCESSION OF
IRMA TURNER WILSON

APPEAL FROM THE
FOURTH JUDICIAL DISTRICT COURT FOR THE
PARISH OF OUACHITA, LOUISIANA

HON. JESSE S. HEARD
JUDGE

HOWELL H. HEARD, Attorney for Plaintiff-Appellant
JAMES SHARP, JR., Attorney for Defendants-Appellants

Before GLADNEY, AYRES, and PRICE, JJ.

AYRES, J.

This proceeding, initially instituted by Joe Wilson, surviving spouse of the decedent, Irma Turner Wilson, has for its purpose a declaration that the last will and testament of the decedent is null and void with a revocation of the proceedings

admitting it to probate. The instrument, executed as a "statutory" will pursuant to the provisions of LSA-R. S. 9:2442, was attacked both as to its form and as to the capacity of the testatrix to make such a will.

Made defendants were Samuel Emanuel, executor of decedent's estate who is also designated a beneficiary thereunder, as was Mary Stewart Emanuel, and Judge G. Claiborne who, in their answer, tendered an issue relating to the right or cause of Joe Wilson to attack the will inasmuch as he failed to establish that decedent left no collateral relations with a prior right to inherit in the absence of a will. After these proceedings were instituted Joe Wilson died. Harold Chapple, his executor, was substituted as a party plaintiff.

The capacity of the testatrix to make the will, predicated upon her alleged inability to read and write, was overruled. The execution of the will, however, was found not to comply with the provisions of the statute as to form and hence was declared null and void. From a judgment in accordance with that conclusion and rescinding and recalling the proceedings relating to the probate of the will, Samuel Emanuel perfected an appeal. Chapple, individually and as testamentary executor of the estate of Joe Wilson, also appealed from a prior judgment in this succession wherein Samuel Emanuel was confirmed as executor. Chapple also answered Emanuel's appeal and prayed that Emanuel not only be removed as testamentary executor but that he be required to pay the costs of court.

The right of Joe Wilson and of his executor to attack decedent's will is again urged before this court in an exception of no cause or right of action. This exception is, in our

opinion, without merit. Wilson, as the surviving husband of the decedent, asserted in his petition his right to inherit from his wife. There it was alleged and established in the record that decedent left neither ascendants nor descendants. Wilson, moreover, alleged decedent left no surviving collateral relations. This allegation was denied by the proponents of her will. The record is deficient as to the proof of this fact.

While it may be presumed that one at his death left a father, a mother, or other ascendants, under the well-recognized fact that everyone must have had a parent at one time, the rule is that collateral kindred have only to establish the death of ascendants and there is no burden resting upon them to show that the collateral relatives died without issue. Thus, collateral relations are not required to prove that those from whom they inherit died intestate, unmarried, and without issue unless evidence is offered to the contrary.

De Gentile v. White Castle Lumber & Shingle Co.,
130 La. 705, 58 So. 517 (1912).

Thus, a collateral claiming an estate need only deny that there are heirs in the descending line. No proof is required of the negative. His opponents must show there were such heirs and then the claimant must establish their death.

Hooter's Heirs v. Tippet,
12 Mart. (O. S.) 390 (1822);

Owens v. Mitchell,
5 Mart. (N. S.) 667 (1827);

Bernardine v. L'Espinasse,
6 Mart. (N. S.) 94 (1827).

This is true notwithstanding the general rule that the burden is upon one claiming to be an heir of a decedent to prove that fact. However, as observed in *Succession of White*, 85 So.2d 528, 536 (La.App., Orl. 1956—certiorari denied), the law is well-settled that where a person claiming an estate is the legal heir of its deceased proprietor, in the absence of proof there are other heirs, he will be considered as the sole and only heir. See also:

Sanford v. Toadvine,
15 La.Ann. 170 (1860);

De Gentile v. White Castle Lumber & Shingle Co., supra.

We can conceive of no basis for not applying these rules in cases where a husband claims by inheritance the estate of his deceased spouse; otherwise he would be required to prove the non-existence of collateral relations, a negative fact in the absence of a prima-facie showing of their existence.

The burden was upon the proponents of the will, in contesting the right of the husband to assert its invalidity, to, at least, establish prima facie the existence of collateral relations of the decedent. This burden has not been met.

The conclusion, therefore, is that Joe Wilson, during his lifetime and after his wife's death, and, since his own death, his executor, has the right to assert the invalidity of decedent's will.

The attack upon the capacity of the testatrix to make the will in the form used is directed to a charge that she could neither read nor write at the time the instrument was signed.

As found by the trial court, the evidence was insufficient to support this charge. From our own review of the evidence, particularly the testimony of decedent's attorney who acted as notary in the execution of the will, as well as that of the witnesses thereto and of numerous other persons who had known her for long intervals of time, the conclusion is inescapable that the testatrix could read and write at the time the will was executed.

The remaining objection to the will is its alleged failure to comply with the requirements of the statute with respect to an attestation clause. The attestation clause serves, as was pointed out in *Succession of Eck*, 233 La. 764, 98 So.2d 181, 184 (1957), and in *Succession of Michie*, 183 So.2d 436, 438 (La. App., 2d Cir. 1966), to certify the facts and circumstances attending the execution of the will. In both of these cases it was held that the attestation clause is a mandatory requirement of the statute and that the signatures "must appear under the attestation clause." Moreover, the statute LSA-R.S. 9:2442 (1) provides that the will shall be signed by the testator in the presence of a notary public and two witnesses. Resort to the language of the will itself is necessary to determine compliance vel non with the aforesaid requirements.

The will, typed on two sheets of paper and signed by the testatrix on each sheet, omitting the provisions relative to the dispositions as immaterial to the issues with which we are now concerned, is in the following language:

> "BEFORE ME, BILLYE L. ADAMS, Notary Public for the Parish of Ouachita, duly commissioned and qualified, and in the presence of MARY VIRGINIA RAWLS

and MORRIS A. NORWOOD, JR., competent witnesses, residing in the Parish of Ouachita, State of Louisiana, personally came and appeared IRMA TURNER STEWART, a resident of the Parish of Ouachita, State of Louisiana, who declared to me, Notary, in the presence of the aforesaid and undersigned witnesses, and that she wished to make her last will and testament, and she, the said IRMA TURNER STEWART, Testatrix, declared the hereinafter expressed provisions to be her last will and testament, revoking all others, in words as follows, to-wit:

"I, IRMA TURNER STEWART, being of sound mind and knowing that life is precarious and wishing to make proper disposition of my property in case of my death, in the presence of the aforesaid Notary and witnesses, do declare this my last will and testament:

• • •

"I constitute and appoint SAMUEL EMANUEL, Executor of my Succession, with full seisin [sic] and dispense him from the obligation of giving bond.

"I declare this to be my last will and testament on this the 7th day of July, 1960.

"Irma Turner Stewart

IRMA TURNER STEWART

"Signed (on each page) and declared by IRMA TURNER STEWART, in our presence to be the last will and testament and in the presence of the Testatrix, IRMA

TURNER STEWART, and each other, we have hereunto subscribed our names on this the 7th day of July, 1960.

"WITNESSES:

"Mary Virginia Rawls

"Morris A. Norwood, Jr.

"In testimony whereof, the said IRMA TURNER STEWART, Testatrix hereto, signs, together with me, the said Notary and the witnesses aforesaid on the 7th day of July, 1960.

"Billye L. Adams

NOTARY PUBLIC

A reading of this will discloses there is no attestation clause above the signature of the testatrix reciting the fact that she signed the will in the presence of the notary and the witnesses, a requirement of the statute, which fact "shall be evidenced in writing **above** the signature of the **notary public** and **witnesses** and the **testatrix** at the end of the will." (Emphasis supplied.) LSA-R.S. 9:2442 (3). This is essential to the validity of the will and compliance cannot be shown dehors the instrument by parol testimony.

Succession of Sparks,
12 Rob. 35 (1845);

Succession of Michie, supra.

It is only in strict compliance with these formalities prescribed by the statute that the testament may be recognized as legal, and the established order of succession may yield to the will of the testator.

Le Blanc v. Baras's Heirs,
16 La. 80, 83 (1840);

Succession of Wilkin,
21 La.Ann. 115 (1869);

Succession of Wilson,
177 La. 119, 148 So. 1 (1933).

For noncompliance with the mandatory requirements of the statute we are constrained to hold that the will is null and void.

The executor of the estate of Joe Wilson complains that Samuel Emanuel was not formally and explicitly removed as testamentary executor of the succession of Irma Turner Wilson and that Samuel Emanuel and Mary Stewart Emanuel should be cast with the costs. The decree that the will is null and void and that the proceedings are rescinded in effect, for all practical purposes, removes Samuel Emanuel as executor of the succession.

Reference to the judgment discloses defendants were condemned to pay costs. There is no need for amendment of the judgment in that respect.

For the reasons assigned, the judgment appealed is af-

firmed. Appellant Samuel Emanuel is assessed with the costs of this appeal.

Affirmed.

I certify that this and the 7 preceding pages contain a true and complete copy of the opinion and judgment of the Court of Appeal for the Second Circuit of the State of Louisiana rendered on the 1 day of June, 1968.

HAROLD L. BOOTH
Clerk of the Court of Appeal, Second Circuit of the State of Louisiana

REHEARING REFUSED
Sept. 25, 1968

HAROLD L. BOOTH
Clerk, Court of Appeal

Gladney, J., dissents from request to grant a rehearing.

APPENDIX "C"

SUPREME COURT OF LOUISIANA
New Orleans, 70112

Number 49,536 December 10, 1968

SUCCESSION OF IRMA TURNER WILSON

In re: Samuel Emanuel, etc., and Mary Stewart Emanuel applying for certiorari, or writ of review, to the Court of Appeal, Second Ciurcuit, Parish of Ouachita

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Writ refused. We find no error of law in the judgment of the Court of Appeal.

[s] JWS

[s] WBH

[s] JBH

[s] FWS

[s] MEB

FOURNET, C. J., and McCALEB, J., are of the opinion that the application should be granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
December 10, 1968

[s] Harold A. Moise, Jr.

Deputy Clerk

APPENDIX "D"

COURT OF APPEAL

Second Circuit
State of Louisiana

October 4, 1967

No. 10,940

No. 10,940

On application by Samuel Emanuel for writs of certiorari, mandamus and prohibition to the Fourth Judicial District Court, in and for the Parish of Ouachita, State of Louisiana, Hon. Jesse S. Heard, Judge

IRMA TURNER WILSON,
SUCCESSION OF

WRITS DENIED.

Remedy from an order or judgment appointing a succession representative is by appeal.

[s] E. L. G.

[s] H. W. A.

[s] J. E. B.

[s] M. E. B.

A TRUE COPY
CLERK'S OFFICE
Shreveport, Louisiana

[s] HAROLD L. BOOTH

Clerk

APPENDIX "E"

Article 1682, Louisiana Civil Code, Expenses of administration

The expenses incurred by the executor for affixing the seals, for the inventory, for the accounts and the other charges relative to his functions, shall be defrayed out of the succession.

APPENDIX "F"

Article 681, Louisiana Code of Civil Procedure, Real and Actual interest required

Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.

APPENDIX "G"

Article 685, Louisiana Code of Civil Procedure, Succession

Except as otherwise provided by law, the succession representative appointed by a court of this state is the proper plaintiff to sue to enforce a right of the deceased or of his succession, while the latter is under administration. The heirs or legatees of the deceased, whether present or represented in the state or not, need not be joined as parties, whether the action is personal, real, or mixed.

APPENDIX "H"

RULE 16-C

DOCKETING AND FIXING OF CASES FOR TRIAL

C. If any attorney of record or party to a suit objects to the date assigned for the trial or hearing of any particular matter, he may present a written motion in chambers or an oral motion in open court before the Judge to whom the case has been allotted to have the fixing set aside and another date assigned for the trial or hearing.